142

Supreme Court, U.S.
FILED
09-473 OCT 20 2009
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

LIOUDMILA LUNKEVICH DYER – PETITIONER

vs.

WAL-MART STORES, INC. – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The United States Court of Appeals for the Eleventh Circuit was correct in deciding as a rule of federal law, that the following requirements are not sufficient to assert that service by mail is a valid method of delivery for a Defendant-Corporation according to the **new amended** Rule 4(h)(1) Federal Rules of Civil Procedure from December 1, 2007:

a) Person authorized by law to serve process has to be involved in sending certified mail;

b) Mail has to be addressed to the agent authorized by statute to receive service of process and the statute so requires.

2. Whether the Eleventh Circuit erred when it did not formulate the question above to be of great public importance, and that this case is a case of first impression after December 01, 2007.

3. Whether the Eleventh Circuit erred to affirm the dismissal of this action based on Rule 4(m), even though Dyer timely filed her "Proof of service".

4. Whether the Eleventh Circuit erred to affirm the District Court order denying default judgment against Wal-Mart.

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION. 4

1. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE ELEVENTH CIRCUIT'S DECISION TO AFFIRM DISMISSAL OF THIS CASE FOR FAILURE TO TIMELY EFFECT SERVICE – RULE 4(m) FED. R. CIV. P. AND ITS OWN INTERPRETATION BECAUSE OF INSUFFICIENT SERVICE – RULE 4h(1). 4

1a. IF CASE WAS DISMISSED FOR FAILURE TO TIMELY EFFECT SERVICE – RULE 4(m) FED. R. Civ. P. – THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION ABOUT SERVING DEFENDANT · CORPORATION IN A WAY THAT CONFLICTS WITH ITS OWN DECISION ON THE SAME MATTER IN ANOTHER CASE AND WITH THE DECISION BY THE EIGHTH CIRCUIT ON THE SAME IMPORTANT MATTER. 5

1b. IF CASE WAS DISMISSED BECAUSE OF INSUFFICIENT SERVICE – RULE 4(h)(1) FED. R. CIV. P. – THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION ABOUT SERVING DEFENDANT - CORPORATION IN A WAY THAT HAS SO FAR DEPARTED FROM NEW COURSE OF FEDERAL JUDICIAL PROCEEDING IN SERVING CORPORATION AFTER DECEMBER 2007, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. 8

2. THE PURE LEGAL ISSUE, THE CONTROLLING FEDERAL QUESTION OF THE LAW RAISED BY DYER IN HER CASE AND HER APPEAL IN PART OF SERVING CORPORATION IS BEYOND THE PARTICULAR FACTS AND PARTIES INVOLVED. THIS CASE IS ONE OF FIRST IMPRESSION AND ALSO HAS TO BE CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE. 15

CONCLUSION 19

INDEX TO APPENDICES

APPENDIX A – The opinion of the United States Court of Appeals for the Eleventh Circuit dated March 11, 2009. . . . . 1a

APPENDIX B – The order of the United States District Court for the Middle District of Florida dismissed action dated June 5, 2008. . . . . 5a

APPENDIX C – Order denied plaintiff "Motion for Certification Specified in 28 U. S. C. Section 1292(b)" from July 8, 2008. . . . . .6a

APPENDIX D – The order of the United States District Court for the Middle District of Florida denied Plaintiff's Motion for a default judgment dated April 28, 2008. . . . . 7a

APPENDIX E – The order of the Eleventh Circuit denied the Petition for Rehearing and Petition for Rehearing En Banc dated May 28, 2009. . . . . 11a

APPENDIX F – Excerpt of case *Lepone-Dempsey v. Carroll County Com'rs*, 476 F.3d 1277, 1280 (11 Cir. 2007). 13a

APPENDIX G – Excerpts of the Rule 4(h) Federal Rule of Civil Procedure 2004-2008. . . . . .14a

APPENDIX H – Excerpt of the Letter to Senators 16a

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Eastern Shore Marine, Inc. v. Robert Smith, No. 08-0022, 2008 WL 697716 17

Emerald Coast Finest Produce Co., Inc. v. QSR Group Three, LLC, No. 3:07-cv-132, 2007 WL 1526650, 1-2 (N.D. Fla. May 24, 2007) 17

Finkelstein v. Department of Transportation, 656 So. 2d 921 (Fla. 1995). 16

Gilliam v. County of Tarrant, 94 Fed. Appx. 230 (5th Cir. 2004) 14

Larsen v. Mayo Medical Center, 218 F.3d 863, 868 8th Cir. 2000) 7, 12, 13

Lepone-Dempsey v. Carroll County Com'rs, 476 F.3d 1277, 1280 (11th Cir. 2007) 6, 7

Transport & General Ins.Co. v. Receiverships of Ins. Exch. Of the Americas, Inc., 576 So.2d 1351, 1352 (Fla. 1st DCA 1991) 14

STATUTES AND RULES

28 U. S. C. §1254(1) 1

Federal Rules of Civil Procedure. 11, 12

Federal Rules of Civil Procedure 2-9, 11-19

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lioudmila L. Dyer respectfully prays that a writ of certiorari issues to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished. The decision of the United States District Court for the Middle District of Florida dismissing action appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided my case 08-14833-DD was March 11, 2009. A timely petition for rehearing and petition for rehearing en banc was denied by the United States Court of Appeals for the Eleventh Circuit on the following dates: May 28, 2009, and a copy of the order denying rehearing appears at Appendix E. An extension of time to file the petition for a writ of certiorari was granted to and including October 25, 2009 on August 25, 2009 in Application No. 09A200. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Rule 4(h)(1) Federal Rules of Civil Procedure 2004 and the same **new amended rule** 2007 are set forth in an appendix to this petition. (App. G, p. 14a, 15a).

STATEMENT OF THE CASE

The Petitioner, Lioudmila Dyer ("Dyer"), filed her Complaint against the Defendant, Wal-Mart Stores, Inc.[1] ("Wal-Mart") on October 19, 2007, asserting claims under Title VII of the Civil Rights Act of 1964.

District Court's order from April 28, 2008 (App. D, p. 10a) denied Dyer's motion for a default judgment against Wal-Mart which Dyer requested for the following reasons:

- Dyer served Wal-Mart timely and properly according to **new amendment** of Rule 4(h);

- Wal-Mart incorrectly titled its "Appearance and Motion to Dismiss";

- Wal-Mart failed to send its Answer to Dyer in a timely and proper manner;

- Wal-Mart did not make any affirmative defense.

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[1] In the Eleventh Circuit's opinion Wal-Mart was erroneously named "former" employer.

One day before the termination of the timeframe, Dyer filed her "Notice of Filing Proof of Service" where she proved that ALL requirements of perfect service were completed according to the **new** amended Rule 4 (h)(1)(B) Federal Rules of Civil Procedure 2007 (App. G, p. 15a).

On June 5, 2008, Court's order "dismissed this action pursuant to Rule 4(**m**) for failure to timely effect service" even though the same order confirmed the fact that one day before the timeframe terminated, the plaintiff filed the proof of service stating that the person authorized by Fed. R. Civ. P. to serve process – "Stuart C. Dyer sent two copies of the summons and complaint" to the defendant's registered agent"[2] by U.S. Express Mail with receipt required (App. B, p. 5a).

Dyer appealed the dismissal (App. B, p. 5a) and related orders:

- the order, which denied Dyer's Motion for Certification (App. C, p. 6a);

- the order issued on April 28, 2008 (App. D, p. 8a, 10a) in the part denying default judgment, which was not appealable until the end of the case.

The United States Court of Appeals for the Eleventh Circuit affirmed dismissal (App. A, p. 4a).

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[2] CT CORPORATION SYSTEM – the only Wal-Mart registered agent authorized by statute to receive service of process and the statute so requires according to the official website www.sunbiz.org.

REASONS FOR GRANTING

The Petition for a Writ of Certiorari should be granted for the following reasons:

1. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE ELEVENTH CIRCUIT'S DECISION TO AFFIRM DISMISSAL OF THIS CASE FOR FAILURE TO TIMELY EFFECT SERVICE – RULE 4(m) FED. R. CIV. P. AND ITS OWN INTERPRETATION BECAUSE OF INSUFFICIENT SERVICE – RULE 4h(1).

The Eleventh Circuit did not solve the following conflict in the District Court's decisions: on April 28, 2008 (App. D, p. 9a, 10a) the District Court based its decision on Rule 4(**h**)(1), but on June 05, 2008 (App. B, p. 5a) in the identical situation the District Court based its decision on Rule 4(**m**): the first decision – denied Dyer's Motion for a default judgment "because the defendant has not been properly served" but the second one, for the same situation, "dismissed action pursuant to Rule 4(m) for failure to timely effect service." The Eleventh Circuit repeats direct and acknowledged conflict in its own decision:

- "We review the court's dismissal of a case under Rule 4(**m**)...";

- "Here, however, the court dismissed Dyer's case "pursuant to Rule 4(**m**)";

- "Therefore, the district court appropriately dismissed her complaint[3] pursuant to Rule 4(m)" (emphasis added). (App. A, p. 2a-4a).

However, on the same pages the Eleventh Circuit based its own opinion on completely different Rule 4(h)(1):

- "[P]laintiff may effect service "by delivering a copy of the summons and the complaint to an officer ... "Fed. R. Civ. P. 4(h)(2)[4]; (emphasis added by Court).
- "In this case, Dyer failed personally to serve any of Wal-Mart's officers, managers, or authorized agents, as required by Rule 4(h)(2)"[4] (emphasis added).

1a. IF CASE WAS DISMISSED FOR FAILURE TO TIMELY EFFECT SERVICE – RULE 4(m) FED. R. Civ. P. – THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION ABOUT SERVING DEFENDANT-CORPORATION IN A WAY THAT CONFLICTS WITH ITS OWN DECISION ON THE SAME MATTER IN ANOTHER CASE AND WITH THE DECISION BY THE EIGHTH CIRCUIT ON THE SAME IMPORTANT MATTER.

In its opinion (App. A, p. 2a) the United States Court of Appeals for the Eleventh Circuit cites

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[3] District Court dismissed action, not Dyer's complaint (App. G, p. 15a).

[4] Court of Appeals incorrectly used the number of the Rule – it is 4(h)(1) not 4(h)(2), which applies "at a place not within judicial district" (App. G, p. 15a).

Lepone-Dempsey v. Carroll County Com'rs, 476 F.3d 1277, 1280 (11th Cir. 2007) to explain its review de novo. Let us use the same case to see Court of Appeals' opinion about a District Court's dismissal without prejudice of the plaintiff's complaint for failure to timely serve the defendants under FED. R. CIV. P. 4(m): "[T]he District Court must still consider whether any other circumstances warrant an extension of time... Only after considering...may the District Court exercise its discretion...The District Court's decision ...**was premature**...it was incumbent upon the District Court to at least consider this factor. Therefore, we reverse the order..." (Emphases added). (App. F, p. 13a).

The District Court must consider whether the plaintiff has shown a good cause for failure of timely delivery a copy of the summons and the complaint. FED. R. CIV. P. does not allow replacing this consideration by giving the following warning: "Failure to comply will result in dismissal action without further notice. This is the plaintiff's last opportunity to comply with Rule 4." (App. D, p. 10a), because the good cause can be present even after the "last" warning or any other circumstances warrant an extension of time based on the facts of the case. Even in the absence of good cause (in Dyer's case, good cause is obviously present – the District Court erroneously interjected the word PERSONALLY and this fact was confirmed in the decision of the Court of Appeals) the District Court must still consider whether any circumstances warrant the extension of

time, if the Court bases its decision on Rule 4(m).

Let us also use second case cited by the Court of Appeals – Larson[5] v. Mayo Med. Ctr., 218 F. 3d 863, 868 (8th Cir. 2000): "First, Fed. R. Civ. P. 4 (m) is irrelevant. The Rule is only a time restriction that requires the summons and complaint to be served within 120 days of filing complaint. It does not address how or when a lawsuit is properly commenced". (Emphasis added). Notwithstanding the foregoing, even assuming that District Court properly dismissed Dyer's case based on Rule 4(m) – which is clearly in direct conflict with the Eighth Circuit opinion in case Larsen v. Mayo and with the Eleventh Circuit opinion in case Lepone-Dempsey v. Carroll County Com'rs – the District Court's order to dismiss Dyer's case has to be reversed as premature. In conflict, the Panel here ruled that "Therefore, the District Court appropriately dismissed her complaint pursuant to Rule 4(m)."

All of the above means that the opinion dated March 11, 2009 affirming dismissal under Rule 4(m) is in direct conflict with opinions of the Eleventh and the Eighth Circuits. Furthermore, in the same case Larsen v. Mayo the Eleventh Circuit held that:

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[5] Larson – mistake from the Appellee's Brief dated December 5, 2008 was repeated in the opinion of the Eleventh Circuit in March 11, 2009 (App. A, p. 4a) – should be Larsen.

"Thus, service was ineffective under Rule 4(h)". (Emphasis added).

1b. IF CASE WAS DISMISSED BECAUSE OF INSUFFICIENT SERVICE – RULE 4(h)(1) FED. R. CIV. P. – THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION ABOUT SERVING DEFENDANT-CORPORATION IN A WAY THAT HAS SO FAR DEPARTED FROM NEW COURSE OF FEDERAL JUDICIAL PROCEEDING IN SERVING CORPORATION AFTER DECEMBER 2007, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The United States Court of Appeals for the Eleventh Circuit confirmed Dyer's claim (App. A, p. 3a) that District court (App. D, p. 9a) erroneously cited Rule 4(h) (1) by splicing and interjecting the word PERSONALLY, which ultimately changed the interpretation for the procedure for serving a corporation:

"Rule 4 provides that service upon a corporation...may be effected according to state law...or by **personally** delivering a copy of the summons and complaint "to an...agent ...and–if the agent is one authorized by statute and the statute so requires–by also mailing a copy of each to the defendant" (emphasis added).

The Eleventh Circuit gave its own interpretation (App. A, p. 3): [A] plaintiff may effect service "by delivering a copy of the summons and of the complaint to an...agent...and – if the agent is one authorized by statute and the statute so requires – by also mailing a copy of each to the defendant.(emphasis added). The term "delivering" appears to refer to personal service." (Emphasis was added by Court).

In aforementioned citation the Court of Appeals states that: "The term "delivering" **appears** to refer to personal service" (emphasis added). If it does in fact refer to personal service, why did the legislature add the word "personally" in Rule 4(e)(2)(A) FED. R.CIV. P.: "delivering a copy of the summons and of the complaint to the individual personally"? The reason legislature added this word "personally" at the end is because the term DELIVERING does not entail personal delivery – otherwise this Rule would read "personally delivering a copy of the summons and of the complaint to the individual personally". In Rule 4(e)(2)(C) legislature uses only the word "delivery" without "personally".

Let us cite Rule 4(e)(2) to observe the meaning in using the word delivery **with** the word personally and **without**:

"**Serving an individual Within a Judicial District of the United States**...by:

(2) doing any of the following:

(A) delivering a copy of the summons and the complaint to the individual personally; ... or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process". (Emphases original).

This citation shows that legislature does not "**appear** to refer to personal service" as the Eleventh Circuit claims in its interpretation but simply uses the word PERSONALLY when legislature means personal delivery and **does not** use word PERSONALLY when it does not mean personal delivery. Notwithstanding the foregoing, even assuming that the Eleventh Circuit interpretation is correct (which it is clearly not) there are still the words "by also mailing a copy of each to the defendant" even in the Eleventh Circuit's citation (App. A, p. 3a) which were not (and could not) be denied or explained by Court of Appeals. In its opinion the Eleventh Circuit confirmed that Dyer did not "file a waiver of service with the district court" (App. A, p. 4a). Let us consider **all** three possible situations with waiver of service:

I. Plaintiff did not request a waiver of service and obviously waiver of service has not been filed;

II. Plaintiff requested a waiver of service but waiver of service has not been obtained and for this reason has not been filed;

III. The Defendant's waiver of service was obtained and has been filed.

The old Rule 4(h) 2004, 2006 (App. G, p. 14a) restricted service upon corporation "by also mailing a copy [of the summons and of the complaint] to the defendant" only in situation II: "from which a waiver of service has not been obtained and filed". Rule 4(h) 2007, 2008 (App. G, p. 15a) permits the plaintiff to mail a copy of the summons and of the complaints "Unless...the defendant's waiver has been filed" – this applies to situations I and II.

The old version of Rule 4(h)(1) in the part of service upon corporation "from which a waiver of service has not been obtained and filed" obviously assumed that a waiver of service was requested, because to obtain something it needs to be requested first. For this reason, in old version if waiver of service was not requested, Plaintiff cannot serve defendant by mailing. Dyer never requested a waiver of service as confirmed by Court of Appeals (App. A, p. 4a) – situation I, for this reason the **new** Rule 4(h) of 2007 permitted her to mail a copy of the summons and the complaints to a registered agent. All of the above proves that a copy of the summons and of the complaint was properly served on Wal-Mart.

There is also the next argument confirming that service by mail to a corporation after 2007 is a valid form of delivery – it is logical and rational that if Federal Legislature makes amendments to Rule 4(h) disallowing service by mail on a corporation, the simplest way would be to omit the phrase, "by also mailing a copy to the defendant" from Rule 4(h). But new amendment of Rule 4(h) not only repeats, "by

also mailing a copy of each to the defendant", but also permits the use of mailing service in more situations: before – (2004) "from which [Defendant-Corporation] a waiver of service has not been obtained and filed" (situation II), now – (2007) "unless...the defendant's waiver has been filed" (situation I and II).

The Eleventh Circuit based its opinion only on one erroneous statement that service by mail is not a valid method to serve a corporation and did not explain why the phrase, "**and also by mail**" is still present in amended Rule 4(h) even the Eleventh Circuit cites by itself this method (App. A, p. 3a). Besides using the language of the Rule 4(h) (as it was proved above – incorrectly) the Eleventh Circuit cited case Larsen v. Mayo to support its opinion. Let us consider this case as a **second and last** argument of the Court's decision.

In the case Larsen v. Mayo there were the other following reasons (not only the provision of serving by mail) show improper service:

a) The case was filed before December 01, 2007.

b) In this case a copy of the summons and the complaint "were not even mailed to an officer, manager or authorized agent of Mayo Clinic, but addressed to "Medical/ Legal Department, Mayo Clinic". In Dyer's case a copy of the summons and of the complaint were mailed to Wal-Mart's Registered Agent.

c) Both times Larsen enclosed the acknowledgment form, and both times Mayo refused to execute the form. Dyer never requested waiver of service. These two cases are in different categories according to Dyer's interpretations of the changes in new Rule 4(h)(1) – situation **I** in Larsen v. Mayo and situation **II** in Dyer's case. In addition, there is another **significant difference** in both cases:

d) In Larsen v. Mayo NO PERSON was involved in service. In Dyer's case – Stuart Dyer, the person authorized by law to serve process, was involved in service and under oath confirmed that 2 copies of the summons and the complaints were sent.

There is no doubt that delivery by certified mail by itself (when waiver of service has not been filed) is not enough for perfect service, because there could be **any** sort of papers inside the envelope, but Rule 4(h)(1) requires that a copy of the summons and the complaint are delivered to the defendant. Stuart Dyer's involvement in service guarantees this condition in Dyer's case. The Court of Appeals did not offer any opinion about another argument presented by Dyer, which confirms that service by mail to a corporation when a person authorized by law to serve process was involved is a valid form of delivery after 2007. Furthermore, Dyer followed the cases cited by the Eleventh Circuit and District Court:

– Larsen v. Mayo in part that summons and

complaint need to be addressed to the Defendant Agency – Stuart Dyer has sent them to CT CORPORATION SYSTEM;

· Gilliam v. County of Tarrant, 94 Fed. Appx. 230 (5th Cir. 2004) in part that there was no party involved in service via certified mail:"The record provides no indication that any **person authorized** by ...law to serve process was involved in Gilliam's purported service via certified mail" (emphasis added) – Dyer not only filed Proof of service sworn under oath by Stuart Dyer, person who is authorized by law, but also filed Post Office receipt with his signature showing that he paid for certified mail.

Also, these cases prove that certified mail alone is not enough for a perfect service because besides requiring a signature: **a)** the summons and the complaint must be addressed to the agent; **b)** person authorized by law must be involved. ALL of these conditions were met in Dyer's service. Dyer does not consider the last case cited in the Eleventh Circuit opinion – Transport & General Ins. Co. v. Receiverships of Ins. Exch. Of the Americas, Inc., 576 So.2d 1351, 1352 (Fla. 1st DCA 1991) because she did not use Florida, but rather Federal Rules as a method of service, following District Court's order (App. D, p. 10a).

The historical process of improving Federal Rules shows that legislature changed the Rule 4 (h) after the institution of registered agents took over (this history is similar of serving the United States Attorney General by Certified or Register Mail

which was allowed in December 1993 amendment). This process shows the logic leading to a radically important **new** amendment in 2007 which proves Dyer's interpretation.

2. THE PURE LEGAL ISSUE, THE CONTROLLING FEDERAL QUESTION OF THE LAW RAISED BY DYER IN HER CASE AND HER APPEAL IN PART OF SERVING CORPORATION IS BEYOND THE PARTICULAR FACTS AND PARTIES INVOLVED. THIS CASE IS ONE OF FIRST IMPRESSION AND ALSO HAS TO BE CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE.

The Supreme Court review will affect every other civil case not only in Florida, but in other states as well, which comes to more than **twenty million** cases per year. The decision marks the first time since December 2007. The issue involves an extraordinarily fundamental question of how the amendment of Rule 4 (h) should be interpreted and applied to service of Defendant Corporation in order to prevent misunderstanding of the meaning of the amended Rule and how to best save financial and energy resources.

The Eleventh Circuit did not make a review of this case to validate or invalidate the fact that the question raised in Dyer's brief is certified to be of great public importance, nor that this case is a case of first impression after December 1, 2007.

This case is the case of first impression after the 2007 amendment of Federal Rules of Civil Procedure was made effective. This fact was confirmed by Court's opinion dated March 11, 2009 because there were not **any** cases mentioned after December 2007 – all three cases cited by the Court of Appeals, were decisions made before December 1, 2007 (as well as all 7 cases cited in District Court decisions and all 20 – in Wal-Mart's brief). For this reason Dyer's claim that her case is the case of the first impression after December 1, 2007 became highly valuable and important, even partial result – a change in the Local Rules – can make the process of serving a corporation more time efficient and less expensive (App. H, p. 16a).

The 2007 version was the most extensive revision of the Rules since 1938 and as it was proved above – the legislature purposely, significantly and intrinsically changed the wording of the Rule 4(h) in order to also change the meaning and conditions contained therein to avoid the unnecessary costs of serving a corporation when the defendant's waiver has not been filed. This case has great public importance to expedite jurisdictional procedure and make it cheaper. The main reason for legislature to amend the Rule 4(h)(1) is to make the new procedure **ten times** cheaper and **twice** as fast as the old one and despite of this to give the same quality result as old one. Considering severe country's economical crises the question raised by Dyer became highly important to the public (Finkelstein v. Department of Transportation, 656 So. 2d 921 (Fla. 1995) holds

that DCA's failure to formulate the question certified to be of great public importance does not deprive the supreme court of jurisdiction, but does make its review more difficult).

This case requires Supreme Court's review to be a precedent to other cases filed after December 01, 2007, because the Eleventh Circuit confirmed that District Court used wrong citation with word PERSONALLY and without Supreme Court's review this opposing meaning and interpretation will continue to cause unnecessary expenses when serving a corporation. Even partial research undertaken by Dyer revealed dozen of decisions of the District Courts, which erroneously cited this Rule by injecting word PERSONALLY, see for example

Emerald Coast Finest Produce Co., Inc. v. QSR Group Three, LLC, No. 3:07-cv-132, 2007 WL 1526650, 1-2 (N.D. Fla. May 24, 2007); Eastern Shore Marine, Inc. v. Robert Smith, No. 08-0022, 2008 WL 697716 .

In many cases, actions were dismissed on the grounds that the service by mail is insufficient method to serve corporations Courts had to inject word PESONALLY in citation of Rule 4(h) to support their decisions. This alone shows that correct citation is not enough grounds for the decision which is another argument in favor of Dyer's interpretation of Rule 4(h)(1).

No counsel would ever risk its client's case by going so far as Dyer went as a *pro se*, because she could sacrifice her personal interests against public interests. This means that this issue will never be raised by any lawyer and the sufficient improvement of this Rule, which was made by legislature, will never be put into full effect and will never break an expensive old way in the procedure of serving the Defendant Corporation. This is a unique situation for this Petition. A Supreme Court review about the controlling question of the law – delivering a copy of the summons and the complaint to a corporation – is necessary. Without the Supreme Court's review, the most radical improvement with significant financial benefits made in the amendment of Rule 4(h) in 2007 and remained in the same rule in 2008 would stay as if there were no differences in the old and new versions of rule 4(h) and only "stylistic" changes were made. This would mean that the legislature just changed the wording of the Rule without changing its meaning in the direction of substantial logical, legal, and economical improvement.

It unreasonably decries a valuable role of the legislature in improvement of jurisdictional procedure especially in the commencement of the action. Such approach and attitude leads to incorrect interpretation of the law when for example Wal-Mart cited this rule on March 19, 2007 using the four-mouth old version and District Court repeats this old version one month later even though Dyer

filed old and new Rule 4(h) as an exhibit. The Eleventh Circuit cited only the part of Rule 4(h), which is identical in 2004 and 2007 but in 2007 this Rule was sufficiently amended and the main issue in Dyer's brief was: "Whether District Court erred ... according to **amended** Rule 4(h)" (emphasis original). The Eleventh Circuit did not bring up any Court of Appeal's decision after December 2007 and bypassed by silence the question about differences in the new and old Rule 4(h). In her brief Dyer supplied her own interpretation of these differences (situations I, II and III) but the Court of Appeals did not confirm or deny the most important part of her claim. The disregard of the sufficient differences in Rule 4(h) can sabotage the improvement of federal legal procedure, and in order to prevent this situation the Supreme Court should review the foregoing case. Dyer recognizes that this Court rarely grants writ of certiorari before judgment. But this case, however, presents extraordinarily important NEW amendment in the most important jurisdictional procedure and Supreme Court review will affect EVERY OTHER civil case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

Dr. Lioudmila L. Dyer

Date: 20 October, 2009

CORRECTED [DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-14833 Non-Argument Calendar

D.C. Docket No. 07-01905-CV-T-23-MAP

LIOUDMILA LUNKEVICH DYER,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal from the United States District Court

For the Middle District of Florida

(March 11, 2009)

Before TJOFLAT, BLACK and BARKETT, Circuit Judges.

APPENDIX A

PER CURIAM:

This is a Title VII case.[1] Lioudmila L. Dyer sued her former employer, Wal-Mart Stores, Inc ("Wal-Mart"), claiming that it had discriminated against her on account of the national origin, Russia. The district court dismissed her suit because she failed to perfect service of process on Wal-Mart as required by Federal Rule of Civil Procedure 4. She appeals the dismissal. We affirm.

Dyer contends that the district court erred in determining that she failed to perfect service of process because she sent a copy of the summons and complaint to Wal-Mart's registered agent by certified mail and this is a permissible method of service upon a corporation under Federal Rule of Civil Procedure 4(h).

We review the district court's interpretation of Rule 4 de novo. Lepone-Dempsey v. Carroll County Com'rs, 476 F.3d1277, 1280 (11th Cir. 2007). We review the court's dismissal of a case under Rule 4(m) for failure to properly serve the defendant for abuse of discretion. Id. Unless the district court's order states otherwise, a dismissal for failure to

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1).

comply with Federal Rule of Civil Procedure is usually interpreted as a dismissal with prejudice. Fed. R. Civ. P. 41(b). Here, however, the court dismissed Dyer's case "pursuant to Rule 4(m)," which provides for dismissal without prejudice. We therefore conclude that the court intended to dismiss the case without prejudice, and we construe the court as having done so.

Rule 4 provides that a plaintiff may serve a corporation in one of two ways. First, a plaintiff may use any method of service allowed in state where the district court is located or where service is made. Fed. R. Civ. P. 4(h)(1), 4(e)(1). The Florida Rules of Civil Procedure provide for service of process by certified mail, but only if the defendant agrees to waive personal service. Fla. R. Civ. P. 1.070(i). Florida courts have held that service by certified mail, without an accompanying waiver, is not sufficient under Rule 1.070. Transport & General Ins. Co. v. Receiverships of Ins. Exch. Of the Americas, Inc., 576 So.2d 1351, 1352 (Fla. 1st DCA 1991).

Second, a plaintiff may effect service "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized ... to receive service of process and – if the agent is one authorized by statute and the statute so requires – by also mailing a copy of each to the defendant." Fed. R. Civ. P. 4(h)(2) (emphasis added). The term "delivering" appears to refer to personal service. Although we

have not specifically addressed this issue in a published opinion, the Eighth Circuit has held that Rule 4(h)(2) requires personal service. Larson v. Mayo Med. Ctr., 218 F.3d 863, 868 (8th Cir. 2000). If the defendant agrees to waive service, however, the plaintiff need only mail a copy of the complaint to the defendant. Fed. R. Civ. P. 4(d).

In this case, Dyer failed personally to serve any of Wal-Mart's officers, managers, or authorized agents, as required by Rule 4(h)(2); nor did she file a waiver of service with the district court. There is also no indication that Wal-Mart accepted service by mail pursuant to the Florida Rules of Civil Procedure.

Therefore, the district court appropriately dismissed her complaint pursuant to Rule 4(m).

AFFIRMED.

A True Copy-Attested Clerk U.S. Court of Appeals,

Eleventh Circuit By: /S/

Deputy Clerk Atlanta, Georgia

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[2] In her brief on appeal, Dyer raises other issues. Since we conclude that dismissal of her case without prejudice was appropriate, we need not, and do not, address those issues.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LIOUDMILA LUNKEVICH DYER,
Plaintiff,

v. CASE NO: 8:07-cv-1905-T-23MAP

WAL-MART STORES, INC.,
Defendant.

_____/

ORDER

After the plaintiff repeatedly failed to serve the summons and complaint in accordance with the requirements of Rule 4, Federal Rules of Civil Procedure, a May 14, 2008, order (Doc. 18) directs the plaintiff, on or before May 29, 2008, to serve the summons and complaint on the defendant in accordance with the requirements of Rule 4 and file proof of service with the Clerk. The order further warns that failure to comply will result in dismissal of this action without further notice and states that "[t]his is the plaintiff's last opportunity to comply with Rule 4." On May 28, 2008, the plaintiff re-filed a "proof of service" (Doc. 19) stating that Stuart C. Dyer sent two copies of the summons and complaint to the defendant's registered agent by "U.S. Express Mail." For the reasons stated in the May 14, 2008, order, the plaintiff's method of service fails to comply with Rule 4. Accordingly, this action is **DISMISSED** pursuant to Rule 4(m) for failure to timely effect service. The Clerk is directed to terminate any pending motion and close the case.

APPENDIX B

ORDERED in Tampa, Florida, on June 5, 2008.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LIOUDMILA LUNKEVICH DYER,
Plaintiff,
v. CASE NO: 8:07-cv-1905-T-23MAP
WAL-MART STORES, INC.,
Defendant.
_____/

ORDER

The plaintiff's "Motion for Certification Specified in 28 U.S.C. Section 1292(b)" (Doc. 24) is **DENIED**.
ORDERED in Tampa, Florida, on July 8, 2008.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LIOUDMILA LUNKEVICH DYER,
Plaintiff,
v. CASE NO: 8:07-cv-1905-T-23MAP
WAL-MART STORES, INC.,
Defendant,
_____/

ORDER

On October 19, 2007, the pro se plaintiff commenced this action. On January 24, 2008, the plaintiff requested an extension of time to effect service, and a January 29, 2008, order (Doc. 5) directed the plaintiff on or before March 3, 2008, to serve the summons and complaint on the defendant in accordance with the requirements of Rule 4, Federal Rules of Civil Procedure. On March 3, 2008, the plaintiff filed a "proof of service" (Doc. 6) showing that the plaintiff sent a copy of the summons and complaint to the defendant's registered agent by certified mail. The defendant contends that this method of service is not permitted by Rule 4 and moves (Doc. 7) to dismiss the complaint pursuant to Rules 4 and 12(b)(5).[1] The plaintiff in turn moves

[1] Because the caption of the defendant's motion reads "United States District Court for the Middle District of Florida– (continued...)

(Doc. 10) for a default judgment against the defendant. In a separate[2] memorandum (Doc. 11) supporting the motion and responding to the motion to dismiss, the plaintiff argues that she complied with the requirements Rule 4(h) and that, as an attached pamphlet ("How to Serve a Summons in a Civil Suit") issued by the Alaska Court System attests (Doc.11-1 at 8-9), "service by mail is one of the possible methods to serve a summons in a civil lawsuit." In response (Doc. 13), the defendant again contends that service has not been effected and notes that in any event the defendant responded to the complaint within twenty days of the defective service by filing a motion to dismiss pursuant to Rule 12(b)(5). Finally, the plaintiff submits a second "proof of service" (Doc. 14) showing that Stuart C. Dyer sent two copies of the summons and complaint to the defendant's registered agent by "U.S. Express Mail."

(...continued)

Ocala Division," the plaintiff requests (Doc. 11 at 1) an order directing the Clerk to delete item no. 7 from the docket and to forward the motion to the Ocala Division. The request is **DENIED**.

[2] See Local Rule 3.01(a) ("In a motion or other application for an order, the movant shall include a concise statement of the precise relief requested, a statement of the basis for the request, and a memorandum of legal authority in support of the request, all of which the movant shall include in a single document not more than twenty-five (25) pages.").

Rule 4 provides that service upon a corporation in judicial district of the United States may be effected according to state law (in this case, Florida law [3]), or by personally delivering a copy of the summons and complaint "to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and–if the agent is one authorized by statute and the statute so requires–by also mailing a copy of each to the defendant." Fed. R. Civ. P. 4(h)(1). "Service by certified mail is not personal delivery, and, therefore, it is not sufficient under federal law." Emerald Coast Finest Produce Co., Inc. v. QSR Group Three, LLC, No. 3:07-cv-132, 2007 WL 1526650, *1-2 (N.D. Fla. May 24, 2007).[4]

Additionally, service by certified mail is generally

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[3] Alaska's rules of service do not apply to this case. See Rule 4(h)(1)(A) (corporation may be served "in the manner prescribed by Rule 4(e)(1) for serving an individual"); Rule 4(e)(1)(individual may be served by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made").

[4] See also Eastern Shore Marine, Inc. v. Smith, No. 08-22, 2008 WL 697716, *2 (S.D. Ala. Mar. 10, 2008) ("'Delivery' under Rule 4 requires personal delivery, not mailing."); Gilliam v. County of Tarrant, 94 Fed. Appx. 230, 230 (5th Cir. 2004) ("[T]he use of certified mail is not sufficient to constitute 'delivering' under Rule 4."); Larsen v. Mayo Med. Ctr., 218 F.3d 863, 868 (8th Cir. 2000); 1 James Wm. Moore et al., Moore's Federal Practice § 4.53 (3d ed. 2007).

insufficient under Florida law.[5] Because the defendant has not been properly served, the plaintiff's motion for a default judgment (Doc. 10) is **DENIED**.

On or before **May 29, 2008**, the plaintiff shall serve the summons and complaint on the defendant in accordance with the requirements of Rule 4 and file proof of service with the Clerk. Failure to comply will result in dismissal of this action without further notice. This is the plaintiff's last opportunity to comply with Rule 4. The defendant's motion to dismiss (Doc.7) is **DENIED WITHOUT PREJUDICE**.

ORDERED in Tampa, Florida, on April 28, 2008.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

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[5] See Fla. R. Civ. P. 1.070; Transp. & Gen. Ins. Co. v. Receiverships of Ins. Exch. of the Americas, Inc., 576 So. 2d 1351, 1352 (Fla. 1st DCA 1991); Hicks v. City of Hialeah, 647 So. 2d 984 (Fla. 3d DCA 1994); Paredes v. Cochran, 666 So. 2d 991 (Fla. 4th DCA 1996). Of course, a defendant may waive service of process and ordinarily has a duty to waive service of process upon receipt of a proper request for waiver of service. See Fla. R. Civ. P. Rule 1.070(i); Trawick's Florida Practice & Procedure § 8:2 (2007 ed.); Fed. R. Civ. P. 4(d). However, the plaintiff has filed no executed waiver of service, and the defendant states (Doc. 7 at 3) that the plaintiff provided no request for waiver of service and that the defendant did not agree to waive service or to accept the complaint by mail.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-14833-DD

FILED

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

May 28, 2009

THOMAS K. KAHN

CLERK

LIOUDMILA LUNKEVICH DYER,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

APPENDIX E

On Appeal from the United States District Court

For the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FPR REHEARING EN BANC

Before TJOFLAT, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing En Banc are denied.

ENTERED FOR THE COURT:

/S/

UNITED STATES CIRCUIT JUDGE

Excerpt of case Lepone-Dempsey v. Carroll County Com'rs, 476 F.3d 1277,1280 (11 Cir. 2007). "The District Court found that the plaintiffs had not properly served...within the time period allowed, and the plaintiffs failed to show good cause for their failure...Even in the absence of good cause, a District Court has the discretion to extend the time. We...hold that when a Court finds that a plaintiff fails to show good cause for failing to effect timely service pursuant to Rule 4(m), the District Court **must still** consider whether any other circumstances warrant an extension of time... **Only after considering** ...may the District Court exercise its discretion...The District Court's decision to dismiss... for failure to timely effect service was **premature**, as it did not clearly consider, after finding that the plaintiffs failed to demonstrate good cause, whether a permissive extension of time was warranted under the facts of this case. Although the running of the statute of limitations...does not require that District Court extend time for service of process under Rule 4(m), it was incumbent upon the District Court to at least consider this factor. Therefore, we reverse the order of the District Court and remand the case for reconsideration in light of this opinion." (Emphases added).

APPENDIX F

FEDERAL RULES AND CIVIL PROCEDURE

Rule 4 (2004 and 2006)

(h) SERVICE UPON CORPORATIONS AND ASSOCIATIONS. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

FEDERAL RULES AND CIVIL PROCEDURE

Rule 4 (2007 and 2008)

(h) SERVING A CORPORATION, PARTNERSHIP, OR ASSOCIATION.
Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

Excerpt of the Letter to Senators

Dear Senator,

In your state there are approximately _____civil cases filed with corporations every year. According to my interpretation, the **new** amendment of Rule 4(h)(1) FED. R. CIV. P. was initiated by Legislature to improve the process of serving a corporation. Unfortunately, the District Court viewed this amendment as a mere change of the wording of the Rule without any changes in its meaning. As a result, I was faced with a dilemma: pay $150 to a licensed server and follow the old procedure or, by risking my own case, try to prove that the amendment does allow alternative method of serving a corporation. I went through a long and expensive process from the Court of Appeals all the way to the Supreme Court. By now my expenditures reached over $9,000 not to mention my personal time taken from family, all the energy spent and stress gained. But I already achieved some great results – the Court of Appeals confirmed that any Plaintiff can choose to follow either method of service allowed in the state or Federal Rules. Every single state can make this procedure twice as fast and ten times less expensive by changing their Local Rules and make certified mail one of the acceptable methods. Your state could save millions of dollars, millions of gallons of gasoline (now used by licensed servers). I would appreciate your kind consideration.

APPENDIX H